UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MOHAMMED YUNUS, Appellant, v. DEPARTMENT OF VETERANS AFFAIRS, Agency.	DOCKET NUMBER AT-1221-99-0160-W-1 DATE: October 7, 1999

Paul A. Donnelly, Esquire, and Laura A. Gross, Esquire, Donnelly & Gross, P.A., Gainesville, Florida, for the appellant.

Kathleen C. Freeble, Esquire, Bay Pines, Florida, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The agency has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. For the reasons given below, we GRANT the petition, REVERSE the initial decision, and DENY the appellant's request for corrective action.

BACKGROUND

¶2 The appellant filed a timely individual right of action (IRA) appeal alleging that his removal from the position of Physician at the agency's Daytona Beach, Florida, Outpatient Clinic, effective July 17, 1998, was taken in reprisal for whistleblowing activity. Initial Appeal File (IAF), Tab 1, and Tab 7, Subtab 4d. After a hearing, the administrative judge granted the appellant's request for corrective action and ordered interim relief if a petition for review were filed. Initial Decision (ID) at 18-19. On petition for review, the agency argues that the administrative judge erred in finding that the appellant made protected disclosures and in finding that the agency did not prove, by clear and convincing evidence, that it would have taken the action in any event. Petition for Review File (PFRF), Tab 1. The agency provided proof of interim relief with its petition. *Id.*

ANALYSIS

The Board will not dismiss the agency's petition for review.

¶3 On July 23, 1999, the appellant filed an untimely motion to dismiss the agency's petition for review on the grounds that the agency did not pay him for all of days after the date of the May 6, 1999 initial decision, and that he did not receive pay stubs for the thirty-one days of back pay that he received in June 1999 so he "could audit the payment amounts to assure the deductions are proper." *Id.*, Tab 5. In response, the agency stated that the initial payment covered the period May 6 through June 5, 1999; that checks covering the period June 6 through July 3, 1999, were issued; that pay stubs explaining the deductions will be forthcoming; and that future payments will be somewhat delayed because the checks "must be written manually due to Appellant's status pending review of this matter." *Id.*, Tab 6.

¶4 Effective May 24, 1999, and before the agency filed its petition for review, the Board revised its interim-relief regulations to provide that failure by an agency to provide evidence of compliance with an interim-relief order "may result in the dismissal of the agency's petition or cross petition for review." 64 Fed. Reg. 27,899, 27,901 (1999) (to be codified at 5 C.F.R. § 1201.115(b)(4)). First, the agency provided evidence that it placed the appellant on the rolls and paid him from the date of the initial decision. PFRF, Tabs 1 and 6. Second, the agency has explained that payment to the appellant has been delayed because of his status while subject to the interim-relief order. Third, the agency has averred that the pay stubs requested by the appellant will be sent to him. Under these circumstances and without making a finding on whether the appellant has shown good cause for the late filing of his motion to dismiss, we find that the agency has complied with the interim-relief order and, assuming that any delay in effecting payment and issuing pay stubs constitutes noncompliance, we exercise our discretion under the revised regulation and do not dismiss the agency's petition.

The appellant is not entitled to corrective action.

¶5 In an IRA appeal, the appellant has the burden of proving the following jurisdictional elements by preponderant evidence: he engaged in whistleblower activity by making a disclosure protected under 5 U.S.C. § 2302(b)(8); the agency took or failed to take, or threatened to take or fail to take, a "personnel action" as defined in 5 U.S.C. § 2302(a)(2); and he raised the issue before the Office of Special Counsel, and proceedings before the Special Counsel were exhausted. *Geyer v. Department of Justice*, 63 M.S.P.R. 13, 17 (1994)**{** TA \l "Geyer v. Department of Justice, 63 M.S.P.R. 13, 17 (1994)" \c 1 **}**. In addition, the appellant must show, by preponderant evidence, that a disclosure described in 5 U.S.C. § 2302(b)(8) was a contributing factor in the personnel action. *Id.* If the appellant makes these showings, corrective action must be ordered unless the agency demonstrates, by clear and convincing evidence, that it would have taken the same action absent the disclosure. *Id.*

¶6 The Whistleblower Protection Act (WPA) does not mandate any particular sequence of analysis in IRA appeals. *Geyer v. Department of Justice*, 70 M.S.P.R. 682, 688 (1996), *aff'd*, 116 F.3d 1497 (Fed. Cir.), *cert. denied*, 118 S. Ct. 634 (1997)**{** TA \l "Geyer v. Department of Justice, 70 M.S.P.R. 682, 688 (1996)" \c 1 **}**. Given our finding, explained below, that the agency proved by clear and convincing evidence that it would have taken the action despite any alleged whistleblowing activity, we need not, and do not, reach the issue (raised on petition for review) of whether the administrative judge was correct in finding that the appellant made protected disclosures. *Id.*

¶7 The administrative judge found that the appellant made the following two sets of protected disclosures: (1) on October 5, 1994, the appellant wrote a memorandum to Gregory Williamson, a Personnel Specialist, and he spoke with his supervisor, Sam E. Hyde, III, M.D., about his concern that Don F. Clardy, a Diagnostic Radiologic Technologist (DRT) whom the appellant supervised, did not meet the qualification standards for the DRT position, and the appellant

continued to follow up on this concern up until the time of his removal; and (2) he informed Dr. Hyde on several occasions about alleged misconduct ("rules violations") by Mr. Clardy, and he continued to raise these allegations up until the time of his removal. ID at 4-7. The appellant does not challenge the administrative judge's findings that his other disclosures were not protected. Hence, at best, the only protected disclosures that the appellant may have made were the two sets of disclosures described above. Thus, we will limit our discussion to those purported disclosures.

¶8 In determining whether an agency showed by clear and convincing evidence that it would have taken a personnel action in the absence of protected disclosures, the Board has considered the strength of the agency's evidence in support of the action; the existence and strength of any motive to retaliate on the part of the agency officials who were involved with the decision; and any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Jones v. Department of the Interior*, 74 M.S.P.R. 666, 672-73 (1997). With respect to the strength of the agency's evidence, the Board considers the weight of the evidence before the agency when it acted. *Social Security Administration v. Carr*, 78 M.S.P.R. 313, 335 (1998), *aff'd*, No. 98-3244 (Fed. Cir. July 30, 1999). Even if relevant facts are developed on appeal to the Board that the agency had no prior reason to know, such facts would not undercut the agency's otherwise sufficiently clear and convincing evidence that, at the time of the action, its decision would have been the same in the absence of whistleblowing. *Id.* However, if an agency fails to investigate a charge sufficiently before bringing an action, such a failure might indicate an improper motive. *Id.*

¶9 The deciding official, Elwood J. Headley, M.D., removed the appellant based on five "reasons," which are listed as "a" through "e" in the proposal letter issued by Dr. Hyde. IAF, Tab 7, Subtab 4f, Exs. 13 and 14. Dr. Headley concluded that

the appellant: (a) was "disrespectful, arrogant, excessive, abusive, and physically intimidating" to Alonzo Poteet, the Clinic Coordinator of the Daytona Outpatient Clinic, when Mr. Poteet attempted to speak with him about allegations that he (the appellant) had made regarding Mr. Clardy; (b) had berated and belittled Clardy in front of two patients, Vernon Wyatt Parker and Robert G. Taylor; was seen by Mr. Taylor putting his hands on Clardy and pushing him out of a room on April 22, 1998; and had on two occasions slammed his office door on Clardy's legs and face; (c) had demonstrated behavior inappropriate for a supervisor; (d) had exhibited disrespectful conduct, used insulting and abusive language to agency personnel, and made defamatory statements about other employees; and (e) had assaulted Mr. Poteet in violation of Florida criminal statute when he "pointed [his] fingers inches away from Mr. Poteet while yelling and displaying other aggressive behaviors," and had jeopardized the agency's commitment to providing a safe work environment by his "actual or perceived threats and action" toward Clardy and Poteet. *Id.*

The evidence the agency had before it was strong.

¶10 When Dr. Headley made his decision, he had before him a Uniform Offense Report prepared by agency Investigating Officer Milt Gordon, who was assigned to conduct an investigation of the appellant's alleged conduct. IAF, Tab 7, Subtab 4o. Officer Gordon interviewed the appellant, Mr. Poteet, Dr. Hyde, Mr. Clardy, Mr. Taylor, and Mr. Parker. *Id.* The results of his investigation revealed that on or about April 13, 1998, while meeting with Poteet, the appellant "became highly agitated and began jabbing fingers within inches of Mr. Poteet's face," that he displayed aggressive behavior toward Poteet, and that Poteet feared that the appellant might physically harm him. *Id.* Officer Gordon learned that the appellant had "displayed the same aggressive finger pointing and intimidating demeanor" toward Dr. Hyde when Dr. Hyde asked the appellant about an incident with Mr. Clardy. The two patients, Taylor and Parker, both independently told

Officer Gordon that, although Clardy had attempted to follow the appellant's instructions, he was "repeatedly berated" by the appellant. They expressed their view that the appellant exhibited "aggressive and belittling demeanor directed at Mr. Clardy." *Id.* Mr. Taylor further informed Officer Gordon that, on April 22, 1998, he witnessed the appellant "place his hands on Mr. Clardy and physically push him out of a room." *Id.* Additional interviews with agency personnel disclosed that on two prior occasions, the appellant slammed his office door into Clardy's legs and face. Officer Gordon reported that the appellant "readily admitted" to slamming the door, stating that he had "'no other choice" in getting Clardy out of the doorway. *Id.* Officer Gordon concluded that the appellant's behavior toward Poteet constituted assault under Florida statute, that the incidents with Clardy constituted criminal battery under Florida law, and that the appellant's conduct toward Mr. Clardy, Dr. Hyde, and Mr. Poteet fell within the definition of "violence in the workplace," as defined by agency policy. *Id.*

¶11 Officer Gordon's report was accompanied by interviews, signed statements, and affidavits from the individuals he contacted. Mr. Taylor stated that he questioned the care he was receiving at the clinic when the appellant, his attending physician, pushed and shoved Clardy out of the room. *Id.* Mr. Parker, who was being seen at the facility for a fluoroscopy examination, said that the appellant "acted like a damn nut" when he berated Clardy who, in Mr. Parker's recollection, did as he was instructed to do by the appellant. *Id.*, Tab 7, Subtab 4q. Mr. Clardy signed a report of contact stating that the appellant slammed a door on his foot after telling him that he "knows people [and] is going to have them make [him] disappear from the face of the earth." *Id.*, Tab 7, Subtab 4r. Dr. Hyde's statement recounts his confrontation with the appellant, who was described as being angry and disrespectful and who demanded a report from Dr. Hyde even though Dr. Hyde was his supervisor. *Id.*, Tab 7, Subtab 4s. Mr. Poteet provided a statement in which he detailed the April 13, 1999 incident

with the appellant. Poteet averred that the appellant jabbed his finger at him, stood over him in an aggressive and belligerent manner, waved his hands around, and engaged in a "tirade" which caused Poteet to be concerned that he might be physically assaulted. *Id.*

¶12 Whether or not the appellant committed the misconduct is not within our authority to decide in this IRA appeal. *Geyer*, 70 M.S.P.R. at 694, 698. Rather, we will examine the evidence that the agency had before it when it took the action. *Id.*[*] The independent reports of Mr. Poteet, Dr. Hyde, Mr. Clardy, and the two patients (Messrs. Taylor and Parker) all indicate a pattern of abusive and threatening conduct by the appellant, and Officer Gordon concluded that the evidence showed such a pattern. Under the circumstances, we find that the agency had strong evidence before it when it took the removal action.

¶13 In finding that the evidence before the agency was not very strong, the administrative judge reviewed the evidence supporting Mr. Clardy's version of events, wondered why some of the events surrounding the alleged misconduct by the appellant were not acted upon sooner, considered the fact that the appellant was allowed to continue working from the date of the purported misconduct to the date of his removal, and essentially adjudicated the "reasons" supporting the appellant's removal. ID at 10-16. The administrative judge relied on statements made by Mr. Poteet in a deposition, made findings about Poteet's credibility based

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[*] If the appellant had the right to appeal his removal directly to the Board then whether he committed the misconduct would be within the scope of the appeal, regardless of the fact that he first sought corrective action from OSC. *See Massimino v. Department of Veterans Affairs*, 58 M.S.P.R. 318, 322-23 (1993). Howver, as a Department of Veterans Affairs (DVA) Physician appointed under 38 U.S.C. § 7401(1), the appellant cannot appeal his removal directly to the Board. *See* IAF, Tab 7, Subtan 1; 5 U.S.C. § 7511(b)(10). Still, the appellant can bring this IRA appeal, in which the only issue is whether the removal was retaliatory, *see Marren v. Department of Justice*, 51 M.S.P.R. 632, 638-39 (1991), *aff'd*, 980 F.2d 745 (Fed. Cir. 1992) (Table), because in 1994 Congress extended the WPA's coverage to DVA Physicians. *See* Pub. L. No. 103-424, § 7, 108 Stat. 4364 (codified at 5 U.S.C. § 2105(f)).

on those deposition statements, and found that the agency did not prove that the appellant made defamatory statements. *Id.* at 13-15.

¶14 As discussed above, with regard to the strength of the agency's evidence, the Board considers the weight of the evidence before the agency when it acted, and even if relevant facts are developed on appeal to the Board that the agency had no prior reason to know, such facts would not undercut otherwise sufficiently clear and convincing evidence that, at the time of the action, the agency would have taken the same action in the absence of whistleblowing. *Carr*, 78 M.S.P.R. at 335. Because the administrative judge did not consider only the evidence before the agency when it acted, but, in effect, adjudicated the reasons for the appellant's removal as if this were an otherwise appealable action, his findings are not entitled to deference. *See generally Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133 (1980) (the Board is free to substitute its own determinations of fact for those of the administrative judge, giving his findings only as much weight as may be warranted by the record and by the strength of his reasoning), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam).

The agency's motive to retaliate was slight, at best.

¶15 In finding that the agency had a strong motive to retaliate against the appellant, the administrative judge relied exclusively on his findings that there was friction between Clardy and the appellant, that Dr. Hyde "was somewhat intimidated by the union of which Mr. Clardy was a member," that Dr. Hyde did not try hard enough to get Gail Winton (the other DRT under the appellant's supervision) to give her version of events, and that Dr. Hyde did not contact Mr. Williamson or anyone else in Human Resources about the "problem" between the appellant and Clardy. ID at 16-17. The administrative judge's brief recitation of his findings on these points does not address the issue, let alone all of the evidence, on whether the agency had a strong motive to retaliate against the appellant because of the alleged protected disclosures. Thus, we will do so. *See Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980).

¶16 There is no evidence showing that Dr. Headley, the deciding official, knew of the disclosures regarding Clardy's alleged misconduct. Dr. Headley testified, without rebuttal, that the first he ever heard of the appellant was when he received the letter of proposed removal. Hearing Transcript (Tr.) at 283. Although Dr. Headley declared that he was aware of the issue regarding Clardy's qualifications to be a DRT, there is no evidence showing that he knew that it was the appellant who raised the issue. *Id.* at 313-14. Moreover, the evidence suggests that the first time Dr. Headley learned of the friction between the appellant and Clardy was when he reviewed the file as the deciding official. *Id.* at 301. There is no evidence showing that Dr. Headley knew of the appellant's specific complaints about Clardy.

¶17 Dr. Headley stated that he considered all of the evidence in Officer Gordon's report, including the interviews with the two patients. *Id.* at 287, 290-93, and 306. Dr. Headley opined that being abusive to supervisors and acting in a disrespectful manner toward other employees in front of patients were extremely

serious offenses, compounded by the fact that the appellant himself was both a physician and a supervisor, positions of trust and respect. *Id.* at 296-98. According to Dr. Headley, the appellant's ability to function as a supervisor was damaged both with respect to his subordinates, including Mr. Clardy, and with respect to other managers, including Dr. Hyde and Mr. Poteet. *Id.* at 297. Dr. Headley also averred that while he ultimately supported Dr. Hyde's proposed action, he "did not just sign off on it," but instead "consider[ed] it very carefully." *Id.* at 319. He stated that he would not lightly impose removal on a physician. *Id.* at 334. Indeed, Dr. Headley did not sustain all of the proposed reasons, including not sustaining a finding that the appellant violated criminal laws against battery. IAF, Tab 7, Subtab 4f, Exs. 13 and 14.

¶18 Dr. Hyde, the proposing official, stated that he knew, as early as 1994, of the appellant's concern that Clardy may not have met the qualification standard for a DRT. Tr. at 353. Dr. Hyde stated that he received information from the personnel department that Clardy had been "grandfathered" into the position because of his prior military service and his work at another facility, and that he was satisfied that Clardy was certified. *Id.* at 354. Dr. Hyde averred that the qualification matter therefore was "not an issue" with him, and that he gave it no further thought because there are a lot of other things in a hospital about which to worry. *Id.* at 354 and 356.

¶19 Dr. Hyde also was aware of the appellant's allegations of misconduct by Mr. Clardy. *Id.* at 383. Dr. Hyde noted that, despite the appellant's complaints against Clardy, the appellant, as Clardy's first-line supervisor, consistently rated him "fully successful or better," including ratings for the periods when Clardy was purported to have committed the misconduct. *Id.* at 355; IAF, Tab 23. Thus, Dr. Hyde stated that it was "real difficult to see that there was a problem with [Clardy's] performance." Tr. at 355. Dr. Hyde testified, however, that Clardy was disciplined for insubordination, based on a report by the appellant, because

the evidence warranted it. *Id.* at 369, 407, 421, 426, and 513. Indeed, the record shows that Clardy was suspended for 14 days based on a report of misconduct presented to Dr. Hyde by the appellant. IAF, Tab 7, Subtab 4q. As to Ms. Winton, Dr. Hyde stated, without contradiction, that she was not even present during many of the events that formed the basis of the complaints made against Clardy by the appellant and against the appellant by Clardy. Tr. at 376 and 384. Moreover, contrary to the administrative judge's finding, Dr. Hyde testified, again without contradiction, that he often went to Human Resources to ask for advice on the best way to mediate the disagreements between the appellant and Mr. Clardy. *Id.* at 385.

¶20 Dr. Hyde was the official who asked for the police investigation. He stated that he did so because the agency's procedure required him to contact security and request an investigating officer whenever there was physical violence or threats of violence, which is the procedure he followed in this case. *Id.* at 439.

¶21 In proposing the appellant's removal, Dr. Hyde considered the agency's policy of zero tolerance in the workplace, the nature of the alleged misconduct (assault and physical aggression), and the possibility that it could happen again. *Id.* at 449; IAF, Tab 7, Subtab 4f, Ex. 13. He also considered Officer Gordon's report in which the appellant acknowledged having engaged in a "physically violent act." Tr. at 475; *see also* IAF, Tab 7, Subtab 4g, Ex. 19. Dr. Hyde stated, and it is uncontested, that he had always rated the appellant with "good competency reviews" even after the alleged protected disclosures, but that the appellant's behavior toward Clardy, Poteet, and himself (which rose to the level of physical confrontation in Clardy's case) was "unacceptable in the federal workplace." Tr. at 450. He averred that his decision to propose removal was reinforced by the professional opinion of Officer Gordon, who concluded that the appellant's conduct violated Florida criminal laws on assault and on battery. *Id.* at 451.

Dr. Hyde testified that if it had been Clardy who shoved and pushed the appellant, Clardy would have been removed. *Id.* at 453.

¶22 Mr. Poteet declared that his relationship with the appellant had always been "collegial and professional," and the appellant presented no evidence to the contrary. Tr. at 548. There is no evidence showing that Poteet knew of the appellant's disclosure concerning Clardy's alleged lack of qualifications. As for the appellant's complaints about Clardy's performance, Poteet stated that he was not taking sides in the apparent "personality conflict" between the appellant and Clardy, but had approached the appellant to try and "resolve the issue amicably between the parties" and to see if mediation or alternative dispute resolution could be used to settle the differences between them. *Id.* at 544 and 568; *see also id.* at 429-32. Poteet stated that he recommended to Dr. Hyde that an investigation be conducted by the security service because allegations of violence were serious and he himself was the subject of an outburst by the appellant. *Id.* at 554, 557, and 559. Other than suggesting that the matter be turned over to security, Poteet testified that he had no role in the proposed action against the appellant other than to comment to Dr. Hyde that battery is a serious offense. *Id.* at 560.

¶23 Michael Good, M.D., the Assistant Medical Director of the North Florida/South Georgia Veterans Health System, heard the appellant's oral response. *Id.* at 666. There is no evidence showing that Dr. Good knew of the appellant's claim that Clardy lacked the qualifications to be a DRT, although Good was aware of "interpersonal and interaction problems" between the appellant and Clardy, and the appellant had sent him a memorandum regarding some of Clardy's purported misconduct. *Id.* at 97 and 667. Dr. Good discussed the proposed removal action with Dr. Headley and Dr. Hyde, and he read Officer Gordon's report. *Id.* at 670 and 688. After reviewing the report and considering the appellant's oral reply, Dr. Good recommended to both Dr. Headley and Dr. Hyde that the appellant should be removed because the evidence supported all

of the reasons for removal and the nature of the alleged misconduct was consistent both with a removal action and with the agency's policy for dealing with such conduct. *Id.* at 677 and 684.

¶24 With the exception of Dr. Hyde, there is no evidence showing that any of the other agency officials involved in the removal action knew that the appellant disclosed a belief that Clardy did not meet the qualification standards for a DRT. While the medical staff members involved in the removal action knew, to one degree or another, about the appellant's complaints against Clardy and Clardy's complaints against the appellant, there is no evidence showing or suggesting that any of the officials involved in this action were motivated to take this action against the appellant because they sided with Clardy and wished to retaliate against the appellant for making reports against Clardy. In fact, Clardy was disciplined when the appellant reported misconduct that the agency found to be substantiated. Moreover, Officer Gordon, who concluded that the appellant had committed the acts which are the basis of the removal, had no knowledge of any protected disclosures.

¶25 The evidence establishes that the agency officials were faced with strong evidence that the appellant had violated the agency's policy of no violence in the workplace, had acted aggressively in front of patients and staff, had physically assaulted a subordinate (Mr. Clardy), had assaulted a management official (Mr. Poteet), and had acted aggressively toward his own supervisor (Dr. Hyde). The record leads us to conclude that the officials who participated in this action were motivated to remove the appellant because they had compelling reasons to believe that, as a supervisor, he had committed serious misconduct deserving of removal and that it was their obligation to protect patients and employees from possible future incidents of this type. Thus, we conclude that, to the extent any part of the agency's action against the appellant was motivated by reprisal for any whistleblowing activity, such motivation was slight, at best.

The evidence does not show that the agency treated the appellant differently than it treats similarly situated employees who are not whistleblowers.

¶26 The evidence shows that there are no other physicians, let alone supervising physicians such as the appellant, who committed the kind of misconduct involved here. IAF, Tab 27, Exs. I-1 through I-18; Tr. at 700. Thus, there is no evidence showing that the agency treated the appellant any differently than it treats similarly situated employees who are not whistleblowers.

Conclusion

¶27 In sum, the agency had strong evidence before it when it took the removal action; it had, at most, a slight motivation to retaliate against the appellant because of his purported whistleblowing; and there is nothing to show that the appellant was treated differently than similarly situated nonwhistleblowers. Weighing these factors, we find that the agency has shown by clear and convincing evidence that it would have removed the appellant on the reasons asserted in Dr. Headley's decision letter, absent the purported disclosures. *See, e.g.*, *Rutberg v. Occupational Safety & Health Administration*, 78 M.S.P.R. 130, 147 (1998); *Geyer*, 70 M.S.P.R. at 698; *Caddell v. Department of Justice*, 66 M.S.P.R. 347, 351-52 (1995), *aff'd*, 96 F.3d 1367 (Fed. Cir. 1996); *Lewis v. Department of the Army*, 63 M.S.P.R. 119, 130 (1994), *aff'd*, 48 F.3d 1238 (Fed. Cir. 1995) (Table). *See generally Lachance v. White*, No. 98-3249, slip op. at 5 (Fed. Cir. May 14, 1999) ("The WPA is not a weapon in arguments over policy or a shield for insubordinate conduct."). We therefore reverse the administrative judge's contrary finding and deny the appellant's request for corrective action.

ORDER

¶28 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review other related material at our web site, http:\\www.mspb.gov.

FOR THE BOARD: _____
Robert E. Taylor
Clerk of the Board

Washington, D.C.